A **CHONG SHAO FEN & ANOR v. MEHRZAD NABAVIEH & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[CIVIL SUIT NO: 22NCVC-788-2011]
19 JUNE 2018

B

CIVIL PROCEDURE: *Judgment and orders – Orders made by court – Application for assessment of damages – Appeal against – Whether application for assessment of damages made out of time – Whether order of court on which application for assessment of damages predicated was complied with*

C

This was the defendants' appeal against the decision of the Deputy Registrar of 17 April 2018 in allowing the plaintiffs' application for directions and a date for assessment of damages. The defendant objected to the application on two grounds, namely, (i) contrary to O. 37 r. 1(1) of the Rules of Court 2012, the application for directions for assessment of damages was made well

D

beyond one month from the date of the operative order; and (ii) the order of the Court of Appeal of 12 January 2015 upon which the plaintiffs' application for assessment of damages was predicated, had not been complied with, namely, para 5(a) which required the appointment of Ir Dr Gue See Sew to obtain a foundation report within 14 days of the said order to aid the

E

court in the assessment of damages. The plaintiffs however maintained that it did not want to secure any report from Ir Dr Gue and it was not obliged to do so. It was argued that the order of the Court of Appeal did not make it incumbent on the plaintiffs to appoint Ir Dr Gue.

F

Held (allowing defendants' appeal; setting aside decision of Deputy Registrar):

(1) The appointment of Ir Dr Gue was related to the issue of damages. Paragraph 5(a) was a specific order by the Court of Appeal and it could not be ignored and rendered otiose by the parties. If the plaintiffs wished

G

to proceed to have damages assessed in accordance with the order of the Court of Appeal, the plaintiffs must first comply with the order and secure the report of Ir Dr Gue. Otherwise the order of the Court of Appeal in para. 5(a) would be rendered futile. Ir Dr Gue's report would be relevant in assessing the damages suffered by the plaintiffs. (para 6)

H

Legislation referred to:
Rules of Court 2012, O. 37 r. 1(1)

For the plaintiff - Chan Chow Wang; M/s Syarikat Chan Chow Wang
For the defendant - Pramjit Singh & Lim Biiang Haur; M/s JS Ling, Diyana & Singh

Reported by Sandra Gabriel

I

JUDGMENT

Darryl Goon Siew Chye JC:

[1] This is the defendant's appeal against the decision of the learned Timbalan Pendaftar of 17 April 2018 in allowing the plaintiffs' application for directions and a date for assessment of damages.

[2] The defendants objected to the application before the Timbalan Pendaftar. Two reasons were advanced for the defendants' objection. The first is that the application for assessment of damages was made out of time. Contrary to O. 37 r. 1(1) of the Rules of Court 2012, the application for directions for assessment of damages was made well beyond one month from the date of the operative order. The second is that the order of the Court of Appeal of 12 January 2015 upon which the plaintiffs' application for assessment of damages is predicated, has not been complied with.

[3] On 12 January 2015, the Court of Appeal in Civil Appeal No. W-02NCVC(W)-1698-07-2013 and Civil Appeal No. W-02NCVC(W)-1699-07-2013 ordered as follows:

PERINTAH

RAYUAN INI di tetapkan untuk perdengaran pada hari ini dalam kehadiran Pramjit Singh, peguam bagi pihak Perayu-Perayu dan T. Gunaseelan, peguam bagi pihak Responden-Responden dalam rayuan sivil no. W-02(NCVC)(W)-1698-07/2013 dan T. Gunaseelan, peguam bagi pihak Perayu-Perayu dan Rizal Zulkeply, peguam bagi pihak Responden-Responden dalam rayuan sivil no. W-02(NCVC)(W)-1699-07/2013 DAN SETELAH MEMBACA Rekod Rayuan dan kesemuanya yang difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak tersebut MAKA ADALAH DENGAN SEBULAT SUARA DIPERINTAHKAN bahawa:

1. Rayuan Sivil no. W-02(NCVC)(W)-1698-07/2013 terhadap liabiliti ditolak;
2. Rayuan Sivil no. W-02(NCVC)(W)-1699-07/2013 dibenarkan dan selanjutnya di perintahkan bahawa liability Merzad Nabavieh dan Noushin Goudazi adalah 30%, liabiliti Majestic United Sdn Bhd adalah 40% dan liabiliti Azman bin Teh (No. K/P : 590816-01-5305) (berniaga di bawah nama dan gaya Perunding Trussmaju) adalah 30%;
3. Kos bagi kedua-dua rayuan diatas dan kos di Mahkamah Tinggi ditetapkan pada RM80,000.00 dan dibayar oleh Responden-Responden yang bertanggungjawab dalam imbangan liabiliti masing-masing.
4. Deposit-Deposit dikembalikan kepada Perayu-Perayu;

A

5. Perintah Mahkamah Tinggi berkenaan remedi-remedi diketepikan dan digantikan dengan perintah-perintah seperti berikut:

(a) Ir. Dr. Gue See Sew dilantik dalam tempoh 14 hari dari tarikh ini untuk membuat satu kajian mengenai "foundation" bagi rumah yang dikenali sebagai No. 50, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur yang dipegang di bawah Geran No: Hakmilik 2724, Lot 14960, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur dan memberi pendapat dan arahan beliau untuk membaiki, sekiranya perlu, bagi membaiki "foundation" rumah tersebut;

B

C

(b) Responden-Responden yang bertanggungjawab membaiki rumah tersebut, jika perlu, dalam ternpoh 3 bulan dari tarikh laporan disediakan oleh Ir. Dr. Gue See Sew.

(c) Semua perbelanjaan bagi laporan Ir. Gue See Sew dan semua kos untuk memperbaiki rumah tersebut ditanggung oleh Responden-Responden yang bertanggungjawab dalam imbangan liabiliti mereka masing-masing;

D

(d) Sekiranya Responden-Responden yang bertanggungjawab gagal memperbaiki rumah tersebut, Perayu-perayu dalam Rayuan No: W-2(NCVC)(W)-1699-07/2013, boleh memperbaiki rumah tersebut dan menuntut kos untuk memperbaiki rumah tersebut dari Responden-Responden yang bertanggungjawab dalam imbangan liabiliti mereka masing-masing;

E

6. Gantirugi ditaksirkan oleh Mahkamah Tinggi; dan

7. Pihak-pihak mempunyai kebebasan untuk memohon.

F

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 12 Januari 2015.

[4] It is common ground that para. 5 of the Court of Appeal's said order has not been complied with. The defendants maintain that the obvious reason for para. 5(a) of the Court of Appeal's order was to aid in the assessment of damages. This view is reinforced by para. 5(b) of the said order. The report of Ir Dr Gue See Sew, maintains the defendants, must first be obtained before the plaintiffs can proceed to assess damages. It is argued that Ir Dr Gue's report will clearly be relevant in the assessment of damages.

G

[5] The plaintiffs however maintained that it does not want to secure any report from Ir Dr Gue and it is not obliged to do so. It is argued that the order of the Court of Appeal does not make it incumbent on the plaintiffs to appoint Ir Dr Gue. The plaintiffs maintain that its hand cannot be tied in this manner. If the defendants wish to appoint Ir Dr Gue, the plaintiffs state that the defendants may do so and the plaintiffs have no objections.

H

I

[6] Having regard to the nature of the claim, and the order of the Court of Appeal, I agree with learned counsel for the defendants that the appointment of Ir Dr Gue is related to the issue of damages. Besides, para. 5(a) is a specific order by the Court of Appeal and it cannot be ignored and rendered otiose by the parties. In my view, if the plaintiffs wish to proceed to have damages assessed in accordance with the order of the Court of Appeal, the plaintiffs must first comply with the order and secure the report of Ir Dr Gue. Otherwise, the order of the Court of Appeal in para. 5(a) will be rendered futile. Ir Dr Gue's report will be relevant in assessing the damages suffered by the plaintiffs.

[7] If for any reason the parties cannot or is not able to appoint Ir Dr Gue, the party intending to progress the matter further and to take advantage of the Court of Appeal's said order should apply to the Court of Appeal. This is why courts allow, and in this instance case, the Court of Appeal has allowed, for an order that the parties do have liberty to apply. This is found in para. 7 of the Court of Appeal's order.

[8] As for the non-compliance with O. 37 r. 1(1) of the Rules of Court 2012, subject to justifiable grounds being given, the court has a discretion to extend time. However, in view of the foregoing, this issue does not arise and need not be dealt with.

[9] For the reasons given above, the defendants' appeal is allowed and the decision of the learned Timbalan Pendaftar is set aside. Costs of RM3,000 to the defendants.